

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KRISTOPHER MYERS,

Defendant.

Case No. 3:22-cr-00067-ART-CSD-1

ORDER

Before the Court is Defendant Kristopher Myers's motion to dismiss based on the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (ECF No. 35). For the reasons stated below, the Court denies the motion.

I. BACKGROUND

Defendant Kristopher Myers was charged by Indictment with a single count of Possession of an Unregistered Firearm in violation of 26 U.S.C. § 5861(d), an offense under the National Firearms Act, 26 U.S.C. §§ 5801–5872 (“NFA”). (ECF No. 1.)

The relevant portion of the NFA provides, “It shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.” 18 U.S.C. § 5861(d). The NFA defines “firearm” to include “a rifle having a barrel or barrels of less than 16 inches in length,” 26 U.S.C. § 5845(a). Guns of this length are commonly referred to as short-barreled rifles. Registering a firearm requires the payment of a \$200 tax; identification of the firearm to be registered; and identification of the applicant, including through copies of their fingerprints and a photograph. 26 U.S.C. §§ 5811–12, 5821–22.

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II. DISCUSSION

Myers moves to dismiss the indictment against him as violating his Second Amendment rights under *Bruen*, 597 U.S. at 1. *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Bruen* recognized that the Second Amendment protects individuals' rights to bear arms for the purpose of self-defense inside and outside the home. *Heller*, 554 U.S. at 592; *Bruen*, 597 U.S. at 24. In *Bruen*, the Supreme Court articulated a two-part test for determining whether firearms regulations are "consistent with the Second Amendment's text and historical understanding," and thus constitutional. 597 U.S. at 24. Under the *Bruen* test: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* The Ninth Circuit has restated the *Bruen* test as follows:

We first consider whether the Second Amendment's plain text covers an individual's proposed course of conduct. *Bruen*, 597 U.S. at 24 []. If so, the Second Amendment presumptively protects that conduct. *Id.* The Government then bears the burden of justifying the challenged regulation by showing that it is consistent with our nation's "historical tradition of firearm regulation." *Id.* Only then may we conclude that the regulation is constitutional. *Id.*

United States v. Perez-Garcia, 96 F.4th 1166, 1178 (9th Cir. 2023).

This case turns on "step one" of the *Bruen* test, namely, "whether the Second Amendment's plain text covers [Myers's] proposed course of conduct." *Bruen*, 597 U.S. at 24. The Government argues that, unlike the firearms at issue in *Heller* and *Bruen*, an unregistered short-barreled rifle is not protected by the Second Amendment, so the Government prevails at step one. Myers counters that short-barreled rifles are protected by the plain text of the Second Amendment, thus satisfying step one, and that he must prevail at step two because the Government has failed to offer any evidence to meet its burden under step two. (ECF No. 35 at 1 (citing *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), *vacated*

1 *pending reh’g en banc*, 2024 WL 719051 (9th Cir. Feb. 22, 2024)).) Thus, both
2 parties agree that the answer to step one, namely whether the Second
3 Amendment protects Myers’s alleged conduct (possessing an unregistered short-
4 barreled rifle), is dispositive.

5 *Bruen* step one involves a “threshold question” of whether the Second
6 Amendment “presumptively protects the individual’s conduct.” *Perez-Garcia*, 96
7 F.4th at 1178. Step one encompasses three related subparts. *See United States*
8 *v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) (“*Bruen* step one . . . requires a
9 textual analysis, determining whether the challenger is part of the people whom
10 the Second Amendment protects, whether the weapon at issue is in common use
11 today for self-defense, and whether the proposed course of conduct falls within
12 the Second Amendment.”) (citing *Bruen*, 597 U.S. at 24; *Heller*, 554 U.S. at 580,
13 627). As the Ninth Circuit stated in *United States v. Duarte*, “Step one of *Bruen*
14 asks the ‘threshold question’ whether ‘the Second Amendment’s plain text covers’
15 (1) the individual, (2) the type of arm, and (3) the ‘proposed course of conduct’
16 that are at issue.” 101 F.4th 657, 671-72 (9th Cir. 2024) (citing *Bruen*, 597 U.S.
17 at 19, 31–32). Neither party disputes that Myers is “of the people” protected by
18 the Second Amendment. *See Duarte*, 101 F.4th at 673-75. The issue here is
19 whether a short-barreled rifle is the kind of weapon, and whether unregistered
20 possession of that weapon is the kind of conduct, protected by the Second
21 Amendment.

22 Not all “arms” are protected by the Second Amendment. The Supreme
23 Court in *Heller* recognized that the Second Amendment “extends only to certain
24 types of weapons.” *See Heller*, 554 U.S. at 622 (discussing *United States v. Miller*,
25 307 U.S. 174, 178 (1939)). In *United States v. Miller*, the Court rejected a Second
26 Amendment challenge to an indictment charging the defendants with
27 transportation of an unregistered short-barreled shotgun in violation of the NFA.
28 *Heller*, 554 U.S. at 622-625 (discussing *Miller*, 307 U.S. at 178). The Court in

1 *Heller* discussed *Miller* and clarified that Miller’s actions were placed outside the
2 protection of the Second Amendment by of the type of weapon at issue, not by
3 Miller’s conduct. *Id.* at 622 (“It is entirely clear that the Court’s basis for saying
4 that the Second Amendment did not apply was *not* that the defendants were
5 ‘bear[ing] arms’ . . . for ‘nonmilitary use.’ Rather, it was that the *type of weapon*
6 *at issue* was not eligible for Second Amendment protection”) (emphasis in
7 original). The Court in *Heller* concluded its discussion of *Miller* by stating: “[w]e
8 therefore read *Miller* to say only that the Second Amendment does not protect
9 those weapons not typically possessed by law-abiding citizens for lawful
10 purposes, such as short-barreled shotguns.” *Heller*, 554 U.S. at 625. The Court
11 added that the right to keep and bear arms under the Second Amendment is
12 limited to “the sorts of weapons” that were “in common use” at the time the
13 Second and Fourteenth Amendments were ratified, and it did not include
14 “dangerous and unusual weapons.” *Id.* at 627 (citations omitted). *Bruen*
15 reiterated the conclusion in *Heller* that there is a “historical tradition of
16 prohibiting the carrying of dangerous and unusual weapons.” 597 U.S. at 21
17 (quoting *Heller*, 554 U.S. at 627) (internal quotation marks omitted).

18 Myers takes issue with *Heller*’s language excluding certain weapons, like
19 short-barreled shotguns, from the scope of the Second Amendment’s text. Myers
20 argues that, for purposes of *Bruen* step one, the term “arms” means “all firearms,”
21 including short-barreled rifles. (ECF No. 64 at 3 (citing *Heller*, 554 U.S. at 581,
22 582).) Myers further argues, relying on *Bruen* and *Duarte*, that the question of
23 whether a weapon is “dangerous or unusual” must be addressed in *Bruen* step
24 two. (ECF No. 64 at 2-3.) This argument aligns with *Teter*, which indicated that
25 the question of whether a butterfly knife is a “dangerous and unusual” weapon
26 must be considered under *Bruen* step two. *Teter*, 76 F.4th at 950. But *Teter* is no
27 longer controlling on this Court, and it addressed the separate question of
28 whether a butterfly knife is an “arm” for purposes of the Second Amendment.

1 *Teter* does not undermine the Supreme Court’s conclusion in *Heller* that certain
2 weapons are simply not protected by the Second Amendment.

3 Myers’s position conflicts with the Supreme Court’s statement in *Heller*
4 that short-barreled shotguns are not protected by the Second Amendment. In
5 *Heller*, the Supreme Court explained that the text of the Second Amendment does
6 not reach dangerous and unusual weapons that are not typically possessed by
7 law-abiding citizens for lawful purposes, including, specifically, “short-barreled
8 shotguns.” *Heller*, 554 U.S. at 625, 627. Neither *Bruen* (which addressed
9 handguns), nor *Teter* (butterfly knives), nor *Duarte* (felon in possession of a
10 firearm) had occasion to revisit this point because none of those cases concerned
11 short-barreled weapons. *Heller*, 554 U.S. at 625, 627. *Bruen* affirmed *Heller*, see
12 *Bruen*, 597 U.S. at 17, and, as other courts have acknowledged, it reiterated
13 *Heller*’s statement that there is a “historical tradition of prohibiting the carrying
14 of ‘dangerous and unusual weapons’,” *Id.* at 21; see *United States v. Broadbent*,
15 2023 WL 6796468, at *4 (E.D. Cal. Oct. 13, 2023) (citing *Bruen*, 597 U.S. at 21
16 (internal quotations omitted)). “Whatever changes *N.Y. State Rifle v. Bruen*
17 brought to the Second Amendment landscape, inclusion of dangerous and
18 unusual weapons in the Second Amendment right isn’t one such change.” *Id.*
19 (quoting *United States v. Sredl*, No. 3:22-CR-71 RLM-MGG, 2023 WL 3597715, at
20 *3 (N.D. Ind. May 23, 2023)). This Court is not persuaded that *Bruen* altered
21 *Heller*’s conclusion that the Second Amendment does not apply to short-barreled
22 shotguns.

23 *Heller*’s statement that the Second Amendment does not apply to short-
24 barreled shotguns applies with equal force to short-barreled rifles. See, e.g.,
25 *United States v. Cox*, 235 F. Supp. 3d 1221, 1227 (D. Kan. 2017) (stating that a
26 short-barreled rifle is “clearly comparable to the short-barreled shotgun at issue
27 in *Miller*”). The Second Amendment protects arms “typically possessed by law-
28 abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 625, 627. The NFA

1 regulates weapons typically used by criminals, not law-abiding citizens. As the
2 Supreme Court recognized in *United States v. Thompson/Ctr. Arms Co.*, 504 U.S.
3 505, 517 (1992), the object of the NFA “was to regulate certain weapons likely to
4 be used for criminal purposes, just as the regulation of short-barreled rifles, for
5 example, addresses a concealable weapon likely to be so used.” The NFA regulates
6 “only such modern and lethal weapons, except pistols and revolvers, as could be
7 used efficiently by criminals and gangsters.” *Id.* The provision of the NFA at issue
8 here, § 5816(d), prohibits possession of *unregistered* “short-barrel shotguns,
9 short-barrel rifles, machineguns, silencers, and destructive devices,” but it does
10 not apply to “basic handguns, revolvers, or long guns.” *See Broadbent*, 2023 WL
11 6796468, at *4 (holding the Second Amendment does not apply to short-barreled
12 machine guns) (citing *Sredl*, 2023 WL 3597715, at *3 (holding the Second
13 Amendment does not apply to unregistered firearms)).

14 Numerous lower courts have held, post-*Bruen*, that unregistered short-
15 barreled rifles are not protected by the Second Amendment because they are
16 “dangerous and unusual weapons” which are “not typically possessed by law-
17 abiding citizens for lawful purposes.” *See Heller*, 554 U.S. at 625, 627; *United*
18 *States v. Miller*, No. 3:23-CR-41-S, 2023 WL 6300581, at *4 (N.D. Tex. Sept. 27,
19 2023) (holding that short-barreled rifles are dangerous and unusual weapons not
20 subject to Second Amendment protections); *United States v. Danielson*, No. 22-
21 299 (MJD/LIB), 2023 WL 5288049, at *4-5 (D. Minn. Aug. 17, 2023) (upholding
22 the constitutionality of § 5861(d) regarding short-barreled rifles); *United States v.*
23 *Saleem*, No. 3:21-cr-86 (FDW/DSC), 2023 WL 2334417, at *1 (W.D.N.C. Mar. 2,
24 2023) (rejecting a Second Amendment challenge as to short-barrel rifles); *United*
25 *States v. Royce*, 2023 WL 2163677 at *3 (D.N.D. Feb 22, 2023) (holding that
26 short-barreled rifles and shotguns are dangerous and unusual weapons not
27 protected by the Second Amendment); *United States v. Rush*, No. 22-CR-40008-
28 JPG, 2023 WL 403774, at *3 (S.D. Ill. Jan. 25, 2023) (“*Bruen* had no impact on

1 the constitutionality of regulating the receipt or possession [of] an unregistered
2 short-barreled rifle.”). The Court is not aware of any case in which a court has
3 found that the Second Amendment protects the right of an individual to possess
4 an unregistered short-barreled rifle.

5 This Court holds, consistent with *Heller* and *Bruen*, that an unregistered
6 short-barreled rifle is not the type of weapon protected by the Second
7 Amendment. Because the plain text of the Second Amendment does not
8 encompass the type of weapon at issue here, Myers cannot succeed on subpart
9 two of the first step of the *Bruen* analysis. Even if he could, he has not shown, as
10 required by subpart three, that the Second Amendment protects his “proposed
11 course of conduct.” The NFA does not bar possession of certain listed firearms;
12 “[i]t simply requires their *registration*.” *United States v. Shepherd*, 2024 WL
13 71724, *6 (S.D. Miss. Jan. 5, 2024) (emphasis original). Myers has not shown
14 that the registration requirement is unconstitutional.

15 **III. CONCLUSION**

16 For the reasons stated, Myers’s motion to dismiss the Indictment (ECF No.
17 35) is denied.

18 Dated this 10th day of June 2024.

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21 ANNE R. TRAUM
22 UNITED STATES DISTRICT JUDGE
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